

**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals**  
800 K Street, NW, Suite 400-N  
Washington, D.C. 20001-8002



(202) 693-7300  
(202) 693-7365 (FAX)  
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Date Issued: **September 26, 2000**

Case No.: **2000-INA-86**

CO No.: **P1999-VA-03308038**

*In the Matter of:*

**ALLEN PORTER COMPLETE LAWN MAINTENANCE**

Employer,

*on behalf of:*

**MIGUEL HENRIQUEZ**

Alien.

Appearance: Joseph A. Devamithran, Esq.  
for Employer and Alien

Certifying Officer: Richard Panati  
Philadelphia, PA

Before: Burke, Vittone and Wood  
Administrative Law Judges

**DECISION AND ORDER**

This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On January 14, 1998, Allen Porter Complete Lawn Maintenance ("Employer") filed an application for labor certification to enable Miguel Henriquez ("Alien") to fill the position of landscape gardener (AF. 147). The job duties for the position are:

Plans and executes small scale landscaping operation and maintains grounds and landscape of private and business residences: Participates with LABORER, LANDSCAPE (agriculture) in preparing and grading terrain applying fertilizers, seeding and sodding lawns and transplanting shrubs and plants, using manual and power-operated equipment. [P]lants lawns, and cultivates them, using gardening implements and power-operated equipment. [P]lants new and repairs established lawns, using seed mixtures and fertilizers recommended for particular soil type and lawn location. [L]ocates and plants shrubs, trees, and flowers selected by property owner or those recommended for particular landscape effect. Mows and trim lawns, using hand mower. Trims shrubs and cultivates gardens. Cleans grounds, using rakes, brooms, and hose. Sprays trees and shrubs, and applies supplemental liquid and dry nutrients to lawn and trees. May dig trenches and install drain tiles.

*Id.* On April 1, 1999, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 140-141). The CO questioned whether permanent full-time employment was available to the Alien because landscaper jobs are usually seasonal. The CO indicated that Employer could rebut this finding by submitting payroll records for the last three years for all workers employed in this or similar positions, and indicated that the weekly payroll records must show each employee by name, the number of hours worked, and gross wages. *Id.* The CO also required Employer to document: (1) that the job duties are performed on a continuing basis; (2) that the job is career oriented and one for which the applicant has demonstrated a commitment; and (3) that occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year. *Id.*

Employer's rebuttal, dated May 6, 1999, contended that the position offered is for a permanent full-time, 12-month position. Employer indicated that due to an increased customer

base, it would be requiring additional hired help. (AF 113). Employer attached copies of customer invoices to demonstrate a continued monthly increase from prior years, but did not submit payroll records, as it has not hired help during the winter months in the past. *Id.*

The CO issued a Final Determination (“FD”) denying certification on June 10, 1999. (AF 110-111). The CO indicated that Employer failed to provide the required documentation. *Id.* From these findings, the CO concluded that the application remained in violation of the Federal regulations and accordingly denied labor certification. *Id.*

Employer has requested a review of the denial and the record has been submitted to the Board of Alien Labor Certification Appeals (“Board”) for such purpose.

### **DISCUSSION**

In an *en banc* decision, a majority of the Board in *Vito Volpe Landscaping* defined the nature and content of full-time employment for landscape workers. *See Vito Volpe Landscaping*, 1991-INA-300 (June 3, 1993)(*en banc*). In the instant case, the issue is whether the job offered fits the definition of “seasonal employment” as defined in *Vito Volpe*. Thus, it is necessary to determine whether Employer sufficiently established that the Alien will be employed full time throughout the year.

In order to make a determination regarding the status of the employment, the CO requested Employer’s employment records for the past three years. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Here, the CO specifically requested payroll records to determine whether the Alien would be employed full-time as a landscape gardener. This documentation was critical to the determination of the Alien’s application. An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *See E & E Landscaping Co.*, 1994-INA-574 (Apr. 2, 1996), *citing STLO Corporation*, 1990-INA-7n (Sept. 9, 1991).

In its Request for Review, Employer states that the payroll records for the last three years were not originally submitted with its rebuttal because there were no employees during the winter months, and proceeded to submit payroll records with its Request for Review. (AF 4-109). Evidence first submitted with the request for review will not be considered by the Board. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). However, it is noted that Employer stated the same position in its rebuttal. (AF 113-114). Specifically, Employer stated:

I am not sending copies of my payroll for the last three years so as the [sic]

prove the maintaining of employees through the winter months. In the past, I usually did not require any employees during the winter months. However, if you still want to see my payroll for the other months then I am more than willing to send copies of the same.

(AF 114).

This response directly addresses the CO's request for documentation in the NOF, by addressing the concern behind the request, *i.e.*, that the position in question is full time employment. The CO did not address this argument, but instead denied the petition for failure to include records that Employer freely admitted would not prove its position, which were thus irrelevant. The CO should have considered this argument and addressed the merits of this application. Accordingly, the following order shall enter.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter **REMANDED** for further consideration consistent with this decision.

**SO ORDERED.**

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JOHN M. VITTON  
Chair, Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, and (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400**

## **Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.